Office Supreme Court, U.S.
FILED
JAN 8 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961

No. 649

MARGARET LAYNE, Executrix of the Estate of William J. Layne, Deceased,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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v.

UNITED STATES OF AMERICA.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Margaret Layne, Executrix of the Estate of William J. Layne, Deceased, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on October 16, 1961.

OPINIONS BELOW

The Opinion of the District Court for the Southern District of Indiana, Indianapolis Division, is reported at 190

Fed. Supp. 532. The Opinion of the Court of Appeals for the Seventh Circuit is as yet unreported.

Such opinions are appended hereto. (App. pp. 1 and 7.)

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was made and entered into on the 16th day of October, 1961. (App. p. 20.) The petition for rehearing was denied on the 3rd day of November, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The instant case presents the following questions:

1. Whether an action exists under the Federal Tort Claims Act for the death of an unactivated National Guardsman caused by the negligence of a civilian federal employee.

2. Whether an unactivated State National Guardsman or his personal representative is barred from recovery under the Federal Tort Claims Act by receipt of certain statutory death benefits.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

The pertinent portions of the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2674; 10 U.S.C. 8079, 8495, 8499; 32 U.S.C. 101, 301, 715; and 38 U.S.C. 331, 401, 416(b)(1)(2), 417, are set forth in the Appendix at pp. 21-28.

STATEMENT OF THE CASE

This action was brought under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2674, by Petitioner to recover dam-

ages for the wrongful death of William J. Layne, deceased. Upon motion by the Respondent, United States of America, the District Court granted summary judgment in favor of Respondent. The Court then overruled Petitioner's timely motion to alter or amend the judgment and for a new trial. The errors relied upon arise out of the granting of the motion for summary judgment.

The complaint is drawn in a single paragraph. (App. below, pp. 2-6.) The complaint alleges that Petitioner is the duly appointed and acting executrix of the Estate of William J. Layne, Deceased, and that the action is brought pursuant to the Federal Tort Claims Act. It alleges further that on July 2, 1959, the decedent was the pilot of an F-84 jet aircraft at Hulman Field, Terre Haute, Indiana; that the duty of operation and management of the control tower and the duty of supervising and operating the air navigational traffic and safety for persons rightfully using the airplanes and facilities, including Petitioner's decedent, had been assumed by the civilian employees of the Respondent. That the control tower and all of the facilities, safety devices, and instruments which were operable from said control tower were in the exclusive custody, control, and possession of the Respondent. That among said safety devices was a certain arresting barrier capable of preventing aircraft crashes by bringing aircraft encountering mechanical or operational failures on take-off to a safe stop. The complaint further alleges that Respondent by contract agreed to operate and raise said arresting barrier when requested and ordered to do so by pilots using said facilities. That on said date Petitioner's decedent attempted take-off in said aircraft; that the aircraft sustained a blow out to one of its tires; that said decedent immediately requested and ordered by radio message to Respondent's agents, servants, and employees in the control tower that

said safety barrier be raised; that the civilian agents, servants, and employees negligently failed and refused to raise said arresting barrier. That as a proximate result of such negligence, the airplane crashed and burst into flames, thereby causing the death of decedent and the resultant damage to Petitioner in the amount of Five Hundred Ninety-Five Thousand Dollars ($595,000.00), which amount is prayed for by Petitioner.

In its amended answer, Respondent denies the material allegations of the complaint and then alleges five (5) separate theories of defense: contributory negligence on the part of the decedent; Respondent was not responsible for the operation of the barrier; the acceptance of the barrier involved the exercise of a discretionary function; Petitioner's decedent assumed the risk involved; and that the receipt by Petitioner of certain statutory benefits under the Servicemen's and Veterans' Acts precluded relief under the Federal Tort Claims Act. (App. below, pp. 8-11.)

On October 20, 1960, Respondent filed its motion for summary judgment (App. below, pp. 11-14), which was sustained by the District Court by an opinion (App. p. 7), entered February 6, 1961.

A motion to alter or amend the judgment and for a new trial was filed February 13, 1961 (App. below, p. 37), which was denied on March 2, 1961. (App. below, pp. 37-38.)

REASONS FOR GRANTING THE WRIT

A State National Guardsman for the first time has been denied the right possessed by other citizens of the United States to sue their Government for a tort committed upon them by the civilian agents or employees of the Government. If this decision, which is one of first impression, is permitted to stand, the courts will have written a new exception to the

Federal Tort Claims Act. It will be an exception without need or reason. It will make "status" the test of liability and determine that a National Guardsman may be acting "incident to service" to the National Government, although such Guardsman is not in the service of the Federal Government. The long line of unbroken cases holding the Federal Government not to be liable for the acts of a State National Guardsman will have to be reappraised due to the fact that if there is sufficient "incident of service" or "status" to preclude a National Guardsman from suing the Federal Government, there would without question be sufficient "status" or "incidents of service" to permit recovery against the Federal Government for the actions of such Guardsmen. The holding of Federal courts in several circuits which recognize the fact of state control over such National Guard units is thus directly contravened. This is certainly another important aspect of the still undetermined extent of the Government's liability under the Federal Tort Claims Act, as was the case when this Court granted certiorari in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

In addition, acceptance of statutory benefits by the personal representative of such a deceased National Guardsman should not and does not act as a waiver under the Federal Tort Claims Act, and to hold to the contrary is to refute the pronouncements and intentions of Congress as interpreted by this Court. Review of the lower court decisions is therefore amply warranted.

I. An unactivated State National Guardsman or his personal representative may recover for injuries or death caused by the negligence of a federal civilian employee.

The Federal Tort Claims Act, 28 U.S.C. 2674, is an all-

embracing and indiscriminate waiver of sovereign immunity to all persons. Unless, therefore, a claimant falls within one of the exceptions stated in 28 U.S.C. 2680, the action is maintainable. No contention has been advanced in this case that this Petitioner falls within any of the statutory exceptions. It is submitted, therefore, that this action must be resolved by an application of the "private person" liability standard established by the Act itself. By this standard the existence of a cause of action here is clear.

A. Fallacious basis of liability used by lower courts.

Both of the lower courts have denied relief in this case by creating a new and distinct test of liability from that established in the Act. This is referred to as "status" existing between the decedent and the National Government. In the consideration of the creation of this concept the lower courts have attached peculiar significance to several facts. First, the lower courts apparently consider important the taking of an oath by the decedent "to support and defend the National Constitution against all enemies, foreign and domestic, bear true faith and allegiance to it, obey the orders of the President of the United States of America. . . ." The fact that the taking of such an oath gives no "status" so as to preclude Tort Claims Act relief is apparent when it is recalled that all state judges in the United States, naturalized citizens, and many other individuals take a similar or even more inclusive oath.

Secondly, the lower courts seek comfort from Article I, Sec. 8 of the United States Constitution and Article 12 of the Indiana Constitution. Actually these provisions tend to refute, rather than support, the lower courts. They reflect the control of Guard activities, and thus the activities of

William J. Layne to be vested in the State of Indiana rather than the Federal Government.

Similarly important to the lower courts in the creation of this "status" concept was the receipt of pay by William J. Layne from the Federal Government. The courts have unanimously rejected this fact as not determinative of whether such a Guardsman is an employee or under the control of the Federal Government. If receipt of Federal pay stamps one with Federal "status" sufficient to preclude recovery under the Federal Tort Claims Act, then all persons operating under Federal grant-in-aid, subsidy, and benefit programs are likewise barred. The absurdity is apparent.

Reference is also made to the fact that William J. Layne "operated a jet plane of the United States of America and at the time in question had the direct duty to the United States of America to safeguard said plane even though he was executing at the same time commands of the State of Indiana." The duty of William J. Layne was no greater than the duty of any other bailee and his only liability in this regard was the withholding from his pay of the amount of any damages that might exist as a result of wilful or negligent operation.

The "dual relationship" or "status" theory adopted by the lowers courts is not novel. As recently as last year a plaintiff sought to predicate liability on the National Government for actions of a New Hampshire Air National Guard officer, on the theory that some sort of status existed similar to that adopted by the District Court in this case.

> *Leary v. United States*, 186 F. Supp. 953 (D.C. N.H., 1960)

It is worthy to note that far more incidents of "federalization" existed in the *Leary* case than exist here. In *Leary*,

the officer of the New Hampshire Air National Guard was on a training flight in conjunction with the New York National Guard when a crash occurred in Massachusetts. The purpose of the flight was to test the Air Defense Warning and Control facilities of the *United States* and was authorized by the National Guard Bureau, a federal agency. The court, however, disposed of the status question as follows:

> "The decisions are unanimous in supporting the conclusion that a member of a non-activated National Guard is not a federal employee. Citing authorities. This case requires no different conclusion even though the flight which resulted in the crash may have had certain federal aspects. The word 'employee' in the Tort Claims Act has no mystical or tergiverse meaning. The United States had no right to control the pilot's manner of flight. It is more in accord with the realities of military life to adopt the view that each serviceman is responsible, generally speaking, only to his superior in the chain of command. To say that an airman is sometimes an employee of the United States and sometimes of the National Guard and sometimes possibly an employee of both is to invite conflicting loyalties and shifting responsibilities. . . ."

Further, the effect of the lower courts' holding in creating a federal "status" concept is unusual, not only for the total want of judicial authority in support of their pronouncements, but also for the reason that the District Court readily conceded that Layne "was following the orders or commands of the State of Indiana." (App. p. 14.) In oral argument the Government conceded that William J. Layne was not acting under Federal orders or subject to their command at the time of his fatal flight. In the Government's briefs they have likewise conceded that he was acting under orders of the State of Indiana.

Petitioner submits that the creation of an "employment status" or "incident to federal service status" where none

existed here forms the very heart of the lower courts' error. It is submitted further that the type of action here is of the nature constituting the very reason for the enactment of the Federal Tort Claims Act itself. To deny relief is, in effect, to destroy the very purpose of the Act.

The lower courts have supplanted the "private person" liability test established by the Act and have, in fact, re written 28 U.S.C. 1346(b) so as to predicate liability on the existence or non-existence of a "status" between the injured person and the National Government, regardless of "private person" liability. The emasculation of the Act is complete. The fact that analogous "private person" liability exists here in the form of operation of the control tower can certainly not be doubted since the case of *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), where the court held that the control operation of a lighthouse on water was within the "like circumstances" provision in the Act. The *Indian Towing Co.* case involved navigational control operations on the water; this case involves those same operations in the air.

See also: *Eastern Air Lines, Inc. v. Union Trust Co., et al.; United States of America v. Union Trust Co., et al.*, 221 F. (2d) 62 (D. C. Cir. 1955), where the Government was held liable for negligent air navigational operations.

B. True test of liability under the Federal Tort Claims Act.

The existence or non-existence of "status" is not the standard of liability under the Act and consequently is not determinative of the instant case. It cannot be overemphasized that the criterion established by the Federal Tort Claims Act for liability on the part of the National Government is not "status," but rather the existence of analogous "private person" liability. It is, therefore, the

activity of the *tort feasor* which determines the applicability of the Act. This is made patently clear in *Feres v. United States*, 340 U.S. 135 (1950), where "private person" liability was lacking. The plaintiff in *Feres* bore a direct relationship not only to the Federal Government, but also to the *tort feasor* himself.

Petitioner respectfully submits that a comprehensive review of *Feres* and the many similar situations adjudicated thereafter conclusively establish the fact that before recovery will be denied under the Federal Tort Claims Act, the Government must establish *all* of the following facts:

1. The *tort feasor* must be performing activity having no civilian counterpart;

2. The plaintiff and *tort feasor* must have a direct relationship to each other concerning this activity; and

3. The injury must have occurred out of that relationship and incident to it.

Petitioner respectfully submits that not *a single one* of the above requirements exists in this case.

In regard to number 1, above, the *Feres* decision held that where one "is disabled in service by others in service" (340 U.S. 143), recovery could not be had under the Federal Tort Claims Act. The court held that the analogous "private person" liability required under the Act was lacking for the reason that the power to conscript a federal army is exclusively governmental.[1] However, in this case the exist

[1] It might be questioned where *Feres* is still the law insofar as it may require exact private person liability to exist. See: *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957), where the court held that the fact that a private person might not have the right to engage in the activity causing the injury may not render the Government immune from liability. See also: *Indian Towing Co. v. United States*, 350 U.S. 61 (1955) and *United States v. Gavagan*, 280 F. (2d) 319 (5th Cir. 1960).

ence of analogous "private person" liability exists at numerous privately owned small airfields throughout the country.

Where the tort feasor is performing activity having a civilian counterpart, recovery is permitted regardless of the existence of "status."

Brooks v. United States, 337 U.S. 49 (1949);
United States v. Brown, 348 U.S. 170 (1954);
Lawrence v. United States, 193 F. Supp. 243 (D.C. Ala. 1961).

The second and equally important factor which must be found before liability is denied is that the plaintiff and the *tort feasor* must have a direct relationship and association to each other concerning the act performed by the *tort feasor*. In *Feres* and all other cases cited to the lower courts this relationship was characterized by a common employment or servitorial nature.

Jones v. United States, 249 F. (2d) 864 (7th Cir. 1957);
Lack v. United States, 262 F. (2d) 167 (8th Cir. 1958);
Buer v. United States, 241 F. (2d) 3 (7th Cir. 1957), *cert. den.* 353 U.S. 974.

The conclusion is inescapable that where this relationship between the plaintiff and the *tort feasor* (as distinguished from the United States Government) is lacking, recovery has without exception been granted. Thus, in *United States v. Brown*, 348 U.S. 170 (1954), the plaintiff was a veteran who was injured in a Veterans Hospital while being treated for a service-connected disability. The veteran and doctor treating him bore no relationship to each other, apart from the doctor-patient relationship, although the

plaintiff as a veteran necessarily occupied a "status" with the Federal Government sufficient to entitle him to the treatment. This Court held that such status between plaintiff and the National Government did not preclude recovery under the Act.

If "status" alone were controlling, then all men in active military service would be precluded from recovering under the Federal Tort Claims Act, even though they might at the time be on furlough or injured in a manner having no military connection. This is the very contention which was refuted in *Brooks v. United States*, 337 U.S. 49 (1949).

The importance of the status of the *tort feasor* and his relationship, if any, to the injured party is well illustrated by the cases of *Lack v. United States*, 262 F. (2d) 167 (8th Cir. 1958), *Jones v. United States*, 249 F. (2d) 864 (7th Cir. 1957), *Lawrence v. United States*, 193 F. Supp. 243 (D.C. Ala. 1961). In the first two cases the rule of *Feres* was applied to bar a federal prisoner from recovery against the Federal Government, based on negligent conduct of one having charge of his custody. The *Lawrence* decision, however, permitted recovery to such federal prisoner where the *tort feasor* was a federal employee having no such relationship to the plaintiff. The court in that decision, at 193 F. Supp. 245, stated:

> "While it is rational to conclude that in the sphere of private individuals there is no equivalent to the jailer-prisoner relationship, it is running a good principle into the ground to declare in terms of a categorical imperative that a federal prisoner, by virtue of his status alone, may not sue the United States under the provisions of the Federal Tort Claims Act *where his claim is based upon the alleged negligence of a federal employee completely disassociated from his status*. . . .

> Nothing in the rational or the holding of *Feres v. U. S.*, 340 U.S., 135, 71 S. Ct. 153, 95 L. Ed. 152, conceding that its vitality as an analogy to federal prisoner cases under the Tort Claims Act has not been impaired by *Rayonier, Inc. v. U.S.*, 352 U.S. 315, 77 S. Ct. 374, 1 L. Ed. 354, or *Indian Towing Co., Inc. v. U. S.*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48, sanctions such a rule cast in absolute terms." (Our emphasis)

This necessary relationship between the plaintiff and the *tort feasor* was the real motivation for the *Feres* case.

In *United States v. Brown*, 348 U.S. 170 (1954), the Supreme Court stated that the *Feres* case was based upon (a) the peculiar relationship of a federal soldier to his superior, the alleged *tort feasor*, (b) the effect of this type of action on military discipline, and (c) the extreme results possible if recovery could be had for negligent orders or acts committed by military persons in the course of their military duty. It is obvious that none of these reasons found in *Feres* exist here.

It is respectfully submitted that even if one were to concede the distortion of *Feres*, insofar as William J. Layne's status is concerned it would avail the Respondent nothing for the reason that analogous "private person liability" would still be lacking in *Feres*, but patently present in Layne.

In this case William J. Layne and the control tower operator bore no common employment or agency relationship to each other. There was no relationship of command, nor any custodial or servitorial status.

Thirdly, in order that a plaintiff be deprived of his cause of action the injury for which he seeks relief must have arisen out of and be incident to the relationship between the

plaintiff and the *tort feasor* who is performing his uniquely governmental activity. This is well established in *Brooks v. United States*, 337 U.S. 49 (1949). In that case the claimant was in active, federal, military, service when killed while on leave by the alleged negligence of a soldier operating an army truck. This Court permitted recovery, holding that the death did not arise out of the relationship, i.e., service between the deceased and the Army.

Servicemen are not, therefore, barred as such from recovery under the Federal Tort Claims Act.

Brooks v. United States, 337 U.S. 49 (1949);
Snyder v. United States, 118 F. Supp. 585, aff. 350 U.S. 906 (D.C. Md. 1953);
Knecht v. United States, 242 F. 2d 929, (3rd Cir. 1957);
Redding v. United States, 196 F. Supp. 871 (D.C. Ark. 1961).

Thus, even the unwarranted categorization of Layne as a federal militiaman determines nothing for the reason that the death was not incident to any relationship between Layne and the *tort feasor*. The *tort feasor's* civilian activity and the tort which resulted to decedent therefrom is completely opposite of the "incident to service" characterization of the *Feres* relationship between the claimant and his superior.

C. Non-existence of "status" sufficient to preclude relief.

It is only after consideration of factors completely distinct from status that this action can properly be determined.

1. Employer-employee.

The lack of an employer-employee relationship between the Federal Government and an unactivated National Guardsman under the Federal Tort Claims Act is universally established and admitted in the Government briefs filed below.[2]

57 A.L.R. 2d 1455;

Williams v. United States, 189 F. (2d) 607 (10th Cir. 1951);

Dover v. United States, 192 F. (2d) 431 (5th Cir. 1951);

McCranie v. United States, 199 F. (2d) 581, *cert. den.* 345 U.S. 922 (5th Cir. 1952);

Mackay v. United States, 88 F. Supp. 696 (D.C. Conn. 1949);

Glasgow v. United States, 95 F. Supp. 213 (D.C. N.D. Ala. 1951);

Elmo v. United States, 197 F. (2d) 230 (5th Cir. 1952);

Leary v. United States, 186 F. Supp. 953 (D.C. N.H. 1960).

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[2] The logic of the law is further extended by the fact that the state courts, in actions where such question was in issue, have uniformly held such Guardsman to be an employee of the state.

Cunningham v. State, 186 N.Y.S. (2d) 146 (Ct. Cl. 1959);
State v. Johnson, 186 Wis. 1, 202 N.W. 191 (1925);
Baker v. State, 200 N.C. 232, 156 S.E. 917 (1931);
Gibson v. State, 173 Misc. 893, 19 N.Y.S. (2d) 405;
Nebraska National Guard v. Morgan, 112 Nebr. 432, 199 N.W. 557 (1924);
Griffith v. National Guard, Military Dept., 70 Idaho 88, 212 P. (2d) 403 (1949);
Globe Indemnity Co. v. Forrest, 165 Va. 267, 182 S.E. 215 (1935);
Bianca v. Austin, 204 App. Div. 34, 197 N.Y.S. 328.

It is worthy also to notice that in Indiana, the situs of this action, the Attorney General of Indiana in "Opinions of the Attorney General of 1958," at page 153 held that members of the Indiana National Guard were ineligible for certain benefits given by statute in Indiana to members of the "Armed Forces" of the United States.

Typical of the above cases is the decision of *Williams v. United States*, 189 F. (2d) 607 (10th Cir. 1951), where the court stated on page 608, as follows:

> "At the time of the accident, the 279th Infantry had not been ordered into the active service of the United States. While, under the provisions of Sec. 58, supra, each unit was a reserve component part of the Army of the United States, and a potential part of such Army, not having been ordered into the active service of the the United States, it retained its status as a National Guard unit of the State of Oklahoma, and its members were servants of the state, not of the United States. This construction is supported by the adjudicated cases."

2. Government places itself in an inconsistent position.

As a result of the lower court decisions, the National Government has been granted immunity from liability because of a "status" between an Indiana Air National Guardsman and the National Government, although it at the same time escapes liability for injuries caused by such National Guardsman because of the lack of such a status.[3]

Thus, if we were to assume that Layne, in the operation of his plane, as he attempted to land negligently dropped an object on a farmer and then a few yards further was himself killed through the negligence of the control tower operator, the Government's inconsistent position would be apparent. In the first instance, it would contend that a complete lack of status, agency, or control existed over Layne's

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[3] The difference in result where an intervening sovereign is involved, for purpose of control, is well exemplified in *O'Toole v. United States* 206 F. (2d) 912 (3rd Cir. 1953), which held a District of Columbia Guardsman to be a federal employee under the Federal Tort Claims Act, due to the lack of such an intervening sovereign. In addition, that case held that the employment status between the District of Columbia Guardsman and the Federal Government *did not arise* "by virtue of Federal recognition of the Guard as a unit of the National Guard of the United States."

flight in denying liability, while in the control tower situation, seconds later, it would proclaim the very existence of status, dual relationship, and control.

3. Statutory determination of National Guardsman's status.

Historically, the various states have retained the right of control, training, planning, and providing for facilities of their respective National Guard units.

> *The Nation's National Guard*, National Guard Association of the United States, 1954, p. 22.

See article written by an attorney for the Claims Division of the Department of Justice admitting that control of National Guard activities is vested in the states. (6 Vand. L. R. 370.)

This is dramatically made apparent by a reading of the "mission" of the National Guard. It reads as follows:

> "To provide sufficient organization in each state so trained and equipped as to enable them to function efficiently at existing strength in protection of life and property and preservation of the peace, order, and public safety, *under competent orders of state authorities.*" (Our emphasis)
>
> *The Nation's National Guard*, National Guard Association of the United States, 1954, p. 9.

The fact that the control and regulation of unactivated National Guard units is vested in the States rather than the National Government is recognized and preserved by statute. These statutes reaffirm the proposition that *until activation*, a National Guard member is not on active duty nor subject to the rules and regulations applicable to his particular service. Thus, 10 U.S.C. § 8495 provides as follows:

> "Members of the Air National Guard of the United States are not in active Federal service except when ordered thereto under law. August. 10, 1956, c. 1041, 70A Stat. 524."

Authorization is given for the President to activate such Air National Guard Units by 10 U.S.C. § 8500.

It is also provided in 10 U.S.C. § 8499, reading as follows:

> "Members of the Air National Guard called into Federal Service, are from the time when they are required to respond to the call, subject to the laws and regulations governing the Air Force, except those applicable only to members of the Regular Air Force. Aug. 10, 1956, c. 1041, 70A Stat. 525."

Even more important, however, are the provisions contained in 10 U.S.C. § 8079, which specificially provides:

> "*When not on active duty, members of the Air National Guard of the United States shall be administered, armed, equipped, and trained in their status as members of the Air National Guard.* Aug. 10, 1956, c. 1041, 70A Stat. 496." (Our emphasis)

The status of the "Air National Guard," referred to in the above statute, is until activation clearly State and not Federal in nature. Thus, the Air National Guard is defined by statute as follows:

> "'Air National Guard' means that part of the organized militia *of the several States* and Territories. . . ." (Our emphasis)
> 32 U.S.C. § 101(6).

Until activation, members of the National Guard have no practical existence as a Federal entity, other than a potential one, *in futuro*.

It is undisputed in this case that neither William J. Layne nor the Indiana Air National Guard unit of which he was a member had been activated or ordered into federal service at any time in question here.

1. Feres and other decisions do not support a "status" theory sufficient to bar recovery.

The lower court, through the creation of a federal "status," has sought to invoke the *Feres* decision. A careful reading of the *Feres* case discloses that none of the vital elements necessary in order to deny recovery under the Federal Tort Claims Act are present in this case. Here, Layne was not disabled "in service by others in service." (340 U.S. 143) He not only was not in the service or employment of the United States, but, further, was killed as a result of the negligence of a *civilian* employee of a *civilian* agency of the Federal Government. The reason for the exclusion which prohibits one in service from suing the Federal Government because of the negligence of his service associates can have no effect in this case for the reason that Layne was not subject to any order of any officer of the United States, including the Commanding General of the United States Air Force. Furthermore, analogous "private person" liability does exist in this case, although it was completely absent in *Feres*. The only control over the activities of the decedent by the Respondent was, as stated, to withhold Federal funds or call him into active service. The latter power is a completely inert one. It has not been exercised and is not involved here. The *Feres* case is neither a bar to this action nor is it authority for the summary judgment here.

Justification for the "status" proposition is sought by the lower court in *Calloway v. Garber*, 289 F. (2d) 171 (9th Cir. 1961), and by claiming that a broader test is involved

in a determination of "incident to service" than is used to determine "scope of employment." Petitioner respectfully submits that neither the *Calloway* case nor the broadness of the "incident to service" test is in any way depositive of this case. If, as the lower court concedes the law to be, a National Guardsman is not an "employee," it is legally an impossibility for him to perform activities "incident to service," regardless of how broad the latter term is construed. The existence or non-existence of employment obviously is the broadest concept involved and necessarily would include the "scope of employment," "*respondeat superior*," and "incident to service" tests. One could be an employee, although he might at a particular time be either within or without any of those particular tests or concepts. *It is an inescapable corollary of this rule, however, that a non-employee could never be within the "scope of employment," "respondeat superior," or "incident to service" concepts.*

II. The receipt of certain statutory death benefits does not bar one from recovery under the Federal Tort Claims Act.

It is exceedingly difficult to determine whether or not the lower court actually adopts Respondent's contention that receipt of certain statutory benefits by Petitioner bar relief here. The lower court discusses the contention, but noticeably shies away from any direct pronouncement. This is easily understandable for the reason that all of the cases involving this question have held that the receipt of military and death benefits did not constitute an exclusive benefit nor preclude the recipient from Federal Tort Claims Act relief.

Brooks v. United States, 337 U.S. 49 (1949);
United States v. Brown, 348 U.S. 110 (1954);
19 A.L.R. (2d) 561;
68 A.L.R. (2d) 876.

This is true, even if the claimant is in active, federal, military service.

Brooks v. United States, 337 U.S. 49 (1949);

Archer v. United States, 217 F. (2d) 548, *cert. den.* 348 U.S. 953 (1955).

The language in the *Brooks* case, previously cited, is worthy of note in this regard. The court there stated, at page 53, as follows:

> "Provisions in other statutes for disability payments to servicemen, and gratuity payments to their survivors, 38 U.S.C.A., Sec. 701, 11 F.C.A., Title 38, Sec. 701, indicate no purpose to forbid tort actions under the Tort Claims Act. Unlike the usual workman's compensation statute, e.g., 33 U.S.C.A., Sec. 905, 10 F.C.A. Title 33, Sec. 905, there is nothing in the Tort Claims Act or the veterans' laws which provides for exclusiveness of remedy. . . ."

And, again, in the case of *United States v. Brown*, 348 U.S. 110, 99 L. Ed. 139 (1954), the court stated as follows on page 111:

> "The *Brooks case* held that servicemen were covered by the Tort Claims Act where the injury was not incident to or caused by their military service. 337 US 49, 52, 93 L ed 1200, 1203, 69 S Ct 918. In that case, servicemen on leave were negligently injured on a public highway by a government employee driving a

truck of the United States. *The fact that compensation was sought and paid under the Veterans Act was held not to bar recovery under the Tort Claims Act. We refused to 'pronounce a doctrine of election of remedies, when Congress has not done so.'* Id. 337 US at 53." (Our emphasis)

William J. Layne was, of course, not entitled to and did not receive federal compensation under the Federal Employees' Compensation Act. Similarly, no such benefits were received by his dependents or anyone on his behalf. The sole authority cited by the Respondent to the effect that Federal Tort Claims Act recovery might be precluded because of exclusive benefits provided elsewhere by statute involved the Federal Employees' Compensation Act and the receipt of benefits by federal employees. Of course, the reasoning fails at the outset since the decedent here was not a federal employee. It fails further for the reason that all of the authority is to the effect that no exclusion of remedies is provided by receipt of servicemen's benefits insofar as the Federal Tort Claims Act is concerned. There is an exclusionary provision in the 1958 Veterans' Benefit Act, relied upon so vigorously by the Government and the lower court, which does in fact provide that receipt of certain benefits under that Act is exclusive insofar as some other remedies are concerned, but notable, as far as this case is concerned, by its absence is any reference whatsoever to receipt of the benefits being exclusive as far as the Federal Tort Claims Act is concerned.

38 U.S.C. 416(b)(1)(2);
38 U.S.C. 417.

CONCLUSION

It is submitted that the lower court decisions in this case judicially create an exception to the Federal Tort Claims Act. They establish a criteria for the determination of liability, i.e., "status" of the injured person, contrary to the "private person" standard in the Act itself. The holdings, however, do more than emasculate the Tort Claims Act. They distort the *Feres* decision, which was characterized first by a lack of "private person" liability; secondly, by the fact that the *tort feasor* was the claimant's associate in military service; and, thirdly, by the fact that the claimant had a direct, active, and servitorial relationship to the National Government by applying such to a situation where the exact opposite of each of these factors existed.

Indeed, the lower court has done more than emasculate the Federal Tort Claims Act and distort *Feres*; it has pronounced a reactionary retreat to the concept of sovereign immunity from which modern legal and social history has so successfully escaped. Modern government has willingly and humanely liberalized the "king can do no wrong" concept and has, by various endeavors, provided a legal remedy to its constituents where the king, in fact, has done a wrong. It has required of the "king" the same conduct and responsibility that is demanded of the "subjects." One would not doubt for an instant the existence of liability here had this misfortune been caused by a "private person."

The Congressional declaration of a remedy for the torts of the sovereign is a meaningless utterance if its application may be judicially denied.

We submit that the relationship of the Government to its citizens, including State Guardsmen, is crucially important

to modern democratic government. This action will determine the progression or retrogression of that relationship. The direction which our law in this matter has taken is obvious. It must be maintained.

Respectfully submitted.

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